

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

Civil Action

No. CV-04-2912

- against -

(Wexler, J.)

MARTIN AIN,

(Tomlinson, M.J.)

Defendant.

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MARTIN AIN,

Third-Party Plaintiff,

-against-

YELLOWSTONE INDUSTRIES INC.,

Third-Party Defendant.

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STIPULATION AND ORDER

WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed a complaint in this action on July 12, 2004 alleging that Defendant Martin Ain violated the implementing regulations of the Safe Drinking Water Act, 42 U.S.C. § 300h, *et seq.* ("SDWA") and violated the implementing regulations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of

1984, 42 U.S.C. § 6901, *et seq.* ("RCRA") in connection with property located at 257/259 Main Street, Hempstead, New York.

WHEREAS, the Complaint against Defendant alleges that injection into unauthorized wells occurred at 257/259 Main Street, Hempstead, New York (the "Facility") at a time at which Defendant was the property owner. The Complaint also alleges that the injection allowed the movement of contaminants into underground sources of drinking water, and the presence of those contaminants may have caused a violation of a primary drinking water regulation. The Defendant retained the services of Yellowstone Industries, Inc. for closure of the wells located at the Facility. The Complaint alleges that the well closure was not completed, but that soils and sludges were removed from the wells and placed into drums. The Complaint alleges that Defendant failed to make a hazardous waste determination as to the solid waste within those drums, as required by 6 N.Y.C.R.R. § 372.2 (a)(2). Moreover, the Complaint alleges that Defendant failed to properly respond to RCRA Section 3007 information request letters regarding, *inter alia*, the contents and disposal of those drums.

WHEREAS, Defendant filed a third-party claim against his former contractor Yellowstone Industries Inc.; third-party defendant Yellowstone Industries Inc. is not a party to this stipulation.

WHEREAS, after filing the Complaint, Defendant voluntarily cleaned up the wells located on the Facility to the satisfaction of the United States, and no injunctive relief in this action appears to be necessary at this time.

WHEREAS, Defendant does not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint.

WHEREAS, the SDWA and its implementing regulations imposes liability upon an owner for its tenants' activities.

WHEREAS, the United States and the Defendant (the "Parties") agree that settlement of the United States' claims against Defendant, without further litigation, is in the public interest.

WHEREAS, the Parties further agree that the Court's approval of this Stipulation and Order ("Stipulation") is an appropriate means of resolving the claims in this action.

NOW THEREFORE, without adjudication or admission of any issue of fact or law, except as provided in Paragraph 1, below, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED AND DECREED as follows:

1. This Court has jurisdiction over the parties to, and subject matter of, this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b), Section 3008 of RCRA, 42 U.S.C. § 6928. Venue lies in this District pursuant to Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b); Section 3008 of

RCRA, 42 U.S.C. § 6928; and 28 U.S.C. §§ 1391 (a) and 1395(a), because Defendant resides in this judicial district and the violations alleged in the Complaint are alleged to have occurred in this judicial district. Notice of the commencement of this action has been given to the State of New York as required by Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2). Defendant waives any and all objections it may have to the Court's jurisdiction and, for purposes of this Stipulation, submits to the Court's jurisdiction.

2. Defendant shall, within 30 days of the date this Stipulation is approved and entered by the Court, pay to the United States a civil penalty in the amount of \$80,000.

3. The payment shall be made by FedWire Electronic Funds Transfer ("EFT") in accordance with current electronic funds transfer procedures, referencing DOJ File No. 90-5-1-1-07662 and USAO File No. 2002v00117. The payment shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit of the U.S. Attorney's Office for the District of Eastern District of New York. Within five business days of payment, Defendants shall provide written notice of payment and a copy of any transmittal documentation to DOJ, EPA, and the USAO for the District of Eastern District of New York at the addresses below.

To DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, D.C. 20044-7611

Re: DOJ No. 90-5-1-1-07662

To USAO:

Denise McGinn
Assistant U.S. Attorney
U.S. Attorney's Office
Eastern District of New York
610 Federal Plaza
Central Islip, New York 11722
Re: USAO No. 2002v00117

To EPA:

Timothy Murphy
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
Office of Regional Counsel, Water & General Law Branch
290 Broadway
New York, New York 10007

4. If the civil penalty is not fully paid when due, Defendant shall pay a stipulated penalty of \$1,000 per day for each day that the payment is delayed beyond the due date. Further, Defendant shall pay interest on the overdue amount, from the original due date to the date of payment, at the statutory judgment rate in accordance with 28 U.S.C. § 1961. Further, Defendant shall be liable for attorneys' fees and costs incurred by the United States to collect any amount due under this Stipulation.

5. All payments required by this Stipulation are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), and are not a tax deductible expenditure for purposes of federal law.

6. The payment by Defendant under this Stipulation shall constitute full settlement and satisfaction of the claims asserted by the United States in the

above-captioned action pursuant to Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b), and Section 3008 of RCRA, 42 U.S.C. § 6928, as alleged in the Complaint.

7. The United States reserves, and this Stipulation is without prejudice to, all rights against Defendant with respect to all other matters not asserted by the United States in the Complaint, including, but not limited to, any criminal liability.

8. This Stipulation shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Stipulation disclose facts or considerations indicating that the Stipulation is inappropriate, improper, or inadequate.

9. This Stipulation will terminate when the Defendant has paid the civil penalty and any stipulated penalties and interest required by this Stipulation.

10. Each party shall bear its own costs and attorneys' fees in this matter, except as provided in paragraph 4, above.

11. The undersigned representative of Defendant and the Assistant Attorney General of the Environment and Natural Resources Division or his or her designee each certify that he or she is fully authorized to enter into the terms and conditions of this Stipulation and to execute and legally bind Defendant and the United States, respectively, to it.

SO ORDERED this ____ day of _____, 2007

THE HONORABLE LEONARD D WEXLER

United States District Judge
Eastern District of New York

FOR PLAINTIFF UNITED STATES OF AMERICA:

Dated: Central Islip, N.Y.

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York
610 Federal Plaza, 5th Floor
Central Islip, New York 11722

By: _____

DENISE MCGINN
Assistant United States Attorney
(631) 715-7871

Dated: New York, N.Y.

ERIC SCHAAF
Regional Counsel, Region 2
U.S. Environmental Protection
Agency

Dated: New York, N.Y.

TIMOTHY C. MURPHY
Assistant Regional Counsel, Region 2
U.S. Environmental Protection
Agency

THE UNDERSIGNED PARTY enters into this Stipulation in the matter of United States of America v. Ain, Civil Action No. CV-04-2912 (E.D.N.Y.):

FOR DEFENDANT:

Dated: December __, 2006

MARTIN AIN

NOTARY PUBLIC

Dated: December __, 2006

FRANK GRAZIADEI, ESQ.
130 Water Street
New York, New York 10005
Attorney for defendant Martin Ain